

ISSUES

The ALJ found that claimant established Kansas jurisdiction over his claim¹ (based upon the premise that Kansas was claimant's principal place of business) and that he sustained an accidental injury arising out of and in the course of his employment with respondent on October 26, 2006. She went on to find that claimant failed to meet "his burden of proof that he sustained any additional impairment as a result of the October 26, 2006 accidental injury." Thus, claimant was denied any permanent partial disability compensation although the right to seek future medical treatment was reserved.

Claimant appealed the Award and contends that it should be reversed and compensation granted for a 20 percent additional disability of the left shoulder as a result of repetitive traumas and a single acute injury on October 26, 2006 sustained while working for respondent.

Respondent urges the Board to reverse the ALJ's findings both on the issue of jurisdiction as well as the finding that claimant sustained an accidental injury arising out of and in the course of his employment on October 26, 2006. Respondent contends that a majority of claimant's work was performed in Missouri and thus claimant's principal place of employment was in Missouri rather than Kansas. Thus, Kansas has no jurisdiction over this claim. Respondent also contends that the damage to claimant's shoulder pre-dated his October 26, 2006 accident. Thus, claimant's inability to establish a physical change in the condition of his shoulder as a result of his accident precludes any recovery in this matter. Alternatively, respondent argues that the Award, as written, should be affirmed as claimant failed to sufficiently prove that he sustained any additional impairment as a direct result of the alleged accident on October 26, 2006.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began working for respondent as a garbage collector in 2001. His job duties included driving a commercial truck, manually pushing rather large and heavy metal garbage containers to his truck and then using the truck to dump the containers. According

¹ Respondent initially stipulated to Kansas jurisdiction but during claimant's testimony at the Regular Hearing respondent withdrew that stipulation, without objection from claimant. At that point, respondent contended that a majority of claimant's work was performed in Missouri and not Kansas. Thus, respondent argued that there was no Kansas jurisdiction under K.S.A. 44-506.

to claimant, these dumpsters can weigh as much as 1,000 pounds.² While a majority of his daily customers were in Missouri (approximately 60 percent), he began and ended his day at the Shawnee, Kansas location. And when the trucks were full during the route, they would return to the Kansas facility to dump the truck and then resume his route.

In January 2003, claimant sustained an accident while working and injured his left shoulder. He reinjured the shoulder a month later again while working. Claimant was provided with treatment and was diagnosed with a partial-thickness tear of the distal left supraspinatus tendon and a labral avulsion injury with acromioclavicular arthrosis. Claimant underwent surgery and at the conclusion of his treatment and recovery, he settled his workers compensation claim for 15.5 percent permanent partial impairment to the left shoulder.³ After surgery, claimant continued to experience some difficulties with his shoulder. According to claimant, his shoulder was “loose” and popped a lot and consistently hurt.⁴

In spite of these problems, claimant returned to work for respondent at the same position. In October 2006, claimant sought an evaluation with Dr. David Paul, his private physician, for his ongoing problems with his left shoulder. On October 20, 2006, Dr. Paul referred claimant for an MRI of the left shoulder and claimant concedes that Dr. Paul told him that if the MRI revealed a rotator cuff tear claimant would possibly require surgery.⁵ The MRI was done on October 24, 2006, but as of October 26, 2006, claimant did not know the results of the MRI.

On October 26, 2006, claimant alleges he reinjured his left shoulder while pushing a garbage container in Kansas City, Missouri. Claimant completed his route for the day and returned to the Kansas facility, informing his employer of his injury. Claimant was referred to a health facility and by the time he was seen there, he had the results of the MRI. Claimant was provided no treatment as the clinic determined that claimant’s problems preexisted and were unrelated to the October 26, 2006 accident.

Claimant had surgery to his shoulder on November 20, 2006. According to Dr. Chris Fevurly, the surgeon primarily found “degenerative changes throughout the labrum and the glenohumeral joint and findings leading to the impingement in the subacromial space of

² R.H. Trans. at 7-8.

³ *Id.*, Cl. Ex. 1 at 2. The parties have agreed that claimant’s preexisting permanent impairment is 15.5 percent.

⁴ *Id.* at 12.

⁵ *Id.* at 29-31.

the left shoulder.”⁶ Claimant did not complete the recommended post-surgery physical therapy as claimant was terminated from his employment with respondent and he no longer had medical insurance. Claimant continues to complain of range of motion deficits in his left shoulder and is unable to use his arm for overhead activities. He still experiences some “popping” and is limited in his ability to lift anything over 30 pounds.

Two physicians have testified in this claim. Dr. James Stuckmeyer was retained by claimant’s counsel and he evaluated claimant on October 17, 2007. Dr. Stuckmeyer reviewed all of the medical reports and concluded that claimant bore a 35 percent permanent impairment to his shoulder pursuant to the 4th edition of the *Guides*.⁷ He further testified that although claimant had already been rated at 15 percent as a result of his earlier injury, the additional 20 percent was attributable *to the repetitive nature of claimant’s job and the substantive exacerbation of October 26, 2006*.⁸ Dr. Stuckmeyer did not distinguish what, if any, of his 20 percent rating was due to the acute injury of October 26, 2006 and what was due to the repetitive injury.

In contrast to Dr. Stuckmeyer’s opinions was the testimony of Dr. Chris Fevurly, who evaluated claimant at the respondent’s request on December 10, 2008. According to Dr. Fevurly, claimant has had lifelong problems with instability in his shoulder with chronic complaints of pain beginning in 2003. He explained that the 2003 accident was likely just one in hundreds of events that likely occurred during claimant’s life which aggravated claimant’s arthritis. In support of this contention, Dr. Fevurly examined claimant’s right shoulder and found much the same symptoms, including instability. Dr. Fevurly opined that the October 26, 2006 accident had little or no impact upon claimant’s need for surgery or his alleged worsening of his left shoulder complaints. And he felt that claimant sustained no additional impairment as a result of the accident.

1. Jurisdiction

As noted by the ALJ, whether there is jurisdiction for this claim, which occurred in Kansas City, Missouri, depends on whether claimant’s “principal place of business” was within Kansas.⁹ That statute provides as follows:

⁶ Fevurly Depo. at 9.

⁷ American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted, and are to the level of the shoulder.

⁸ Stuckmeyer Depo. at 10.

⁹ K.S.A. 44-506.

. . . the workers compensation act shall apply also to injuries sustained outside the state where: (1) the principal place of employment is within the state. . .

The ALJ concluded the claimant's principal place of business was in Kansas because claimant reported to work each day in Shawnee, Kansas and was dispatched from that location. The ALJ remained unpersuaded by respondent's argument that a majority of claimant's route was within Missouri and thus, Missouri was his "principle [sic] place of employment". She reasoned that "[a]lthough [c]laimant was assigned regularly to Missouri routes, he reported to work each day in Kansas and returned to headquarters to empty the trash truck and the Kansas landfill during the workday. The court finds that it is irrelevant that [c]laimant performed 60% of his work in Missouri and 40% in Kansas since he was based out of the Shawnee, Kansas location."¹⁰

Claimant began and completed each day in Shawnee, Kansas and a significant portion of his route, albeit not majority, was within Kansas. He was dispatched from this location and returned here to empty his trash truck and then would resume his route. The applicable statute does not contemplate a strict analysis of time spent in any given place as advocated by respondent. Rather, it compels the finder of fact to consider all of the claimant's job activities and weigh their relative importance when determining the principal place of one's employment. The Board has considered the parties' arguments as well as the evidence contained within the record and finds the ALJ's analysis and her ultimate finding on this issue should be affirmed.

2. Personal injury by accident arising out of and in the course of his employment on October 26, 2006.

Claimant alleges he sustained an acute injury on October 26, 2006. To be clear, he has not alleged a series of repetitive injuries as a result of his work activities.¹¹ The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.¹² "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."¹³

¹⁰ ALJ Award (Aug. 7, 2009) at 5.

¹¹ Application for Hearing (E-1) filed with the Division on June 7, 2009); R.H. Trans. at 3.

¹² K.S.A. 2005 Supp. 44-501(a).

¹³ K.S.A. 2005 Supp. 44-508(g).

Claimant's testimony as to the existence of an accident on that date and the increase in his symptoms is unchallenged. And while there is no dispute that claimant had an underlying pathology in his left shoulder which caused him ongoing problems, he nonetheless had an acute increase in symptoms which he reported to his employer. The fact that claimant had a previous injury to the same body member does not invalidate claimant's claims of acute injury and resulting pain. Like the ALJ, the Board is persuaded that claimant proved it is more likely than not that he sustained an injury arising out of and in the course of his employment with respondent on October 26, 2006.

3. Nature and extent of claimant's impairment.

The parties agreed that claimant had a 15.5 percent preexisting permanent partial impairment. Claimant asks the Board to adopt the impairment opinion offered by Dr. Stuckmeyer who assigned a 20 percent *additional* permanent partial impairment. Conversely, respondent suggests the Board should merely affirm the ALJ's conclusion that, consistent with the testimony of Dr. Fevurly, claimant failed to prove that he sustained any additional impairment as a result of the October 26, 2006 accident.

As the ALJ noted, claimant has not claimed that he sustained injury due to the repetitive nature of his work. His E-1 and the Regular Hearing stipulations merely allege a single date of accident, that being October 26, 2006. The problem with Dr. Stuckmeyer's opinion is that he assigned an additional 20 percent impairment (over and above the 15.5 percent sustained in the 2003 accident) due to the claimant's repetitive work activities as *well as the incident of October 26, 2006*. In other words, the increase in impairment found by Dr. Stuckmeyer is attributable to a combination of two events, one of which is not the focus of this claim. Dr. Stuckmeyer was not asked nor did he volunteer what, if any, of his 20 percent impairment is attributable solely to the October 26, 2006 accident. Thus, his opinion as to the additional impairment is not entirely helpful.

Given the limitations of Dr. Stuckmeyer's opinion, the ALJ was left with Dr. Fevurly's testimony. And after considering his testimony as well as that offered by claimant, the Board finds the ALJ's conclusion that claimant failed to establish that he sustained any additional impairment *as a result of his October 26, 2006 accident* should be affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Marcia Yates Roberts dated August 7, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark E. Meyer, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Marcia Yates Roberts, Administrative Law Judge